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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1959.

No. 162

IN THE MATTER
OF
S. S. SILBERBLATT, INC.,
Petitioner,

vs.

THE TAX COMMISSION OF THE STATE OF NEW YORK,
Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No.

IN THE MATTER
of
S. S. SILBERBLATT, Inc.,
Petitioner,
against
THE TAX COMMISSION OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petitioner, S. S. Silberblatt, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in this case April 17, 1959.

Opinions Below

The opinion of the New York Court of Appeals is reported at 5 N. Y. 2d 635 (see Appendix, *infra*, pp. 21-25).

The opinion of the Appellate Division of the New York Supreme Court, Third Department, is reported at 6 App. Div. 2d 603 (R. fols. 115-137). Neither the New York Supreme Court, Special Term, nor the New York State Tax Commission wrote an opinion.

Jurisdiction

The judgment of the Court of Appeals of the State of New York sought to be reviewed was dated and entered April 17, 1959, and a copy thereof is appended to this petition in the Appendix at pages 26-28. There were no orders respecting a rehearing or granting an extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

Question Presented

In May, 1957, pursuant to the provisions of the National Housing Act, the Department of the Air Force of the United States (hereinafter called the "Department") undertook the construction of a government-owned "Capehart Family Housing Project" (as distinguished from a "Wherry Military Housing Project") at the Plattsburgh, New York, Air Force Base on lands owned by the United States. The petitioner was the low bidder. Because of inadequate appropriated funds, the Department arranged a complicated method of financing the construction. The Department required the petitioner to organize five Delaware corporations which leased government lands, issued notes for the total amount of the contract price and mortgaged the leaseholds to private banking institutions. The proceeds of the mortgages were paid to the petitioner. Pursuant to the Statute, the Department assumed payment of the entire mortgage debt when it was incurred. Also, the Department will become sole owner of the five corporations before the debt falls due. In order to complete the required mortgage transactions, the petitioner was obliged to pay the New York mortgage recording tax which it did, under protest. This proceeding was brought to recover the amount so paid.

The question presented is whether mortgages covering leasehold interests in lands leased from the United States after August 11, 1955, and used in financing the construction of a "Capehart Family Housing Project" at Platts-

burgh Air Force Base, New York, were, when recorded, subject to the tax imposed by Section 253 of the New York Tax Law.

The determination of the rights and obligations of the parties in interest requires the construction and interpretation of provisions of the Constitution and National Housing Act of the United States, relating to the respective powers of the United States and the State of New York, and of the numerous instruments used by the Department to consummate the transaction.

Statutes Involved

The constitutional provisions and statutes involved are the following:

U. S. Constitution, Article 1, Section 8;
U. S. Constitution, Amendment XIV;
National Housing Act as amended by Title IV of the Housing Amendments of 1955, P. L. 345; Chap. 783, and Title V of the Housing Act of 1956, P. L. 1020; Chap. 1027 (12 U. S. C. 1748-1748d; 42 U. S. C. 1594-1594g), commonly called the "Capehart Act";
Tax Law of the State of New York, §§ 2, 3, 250, 253.

The pertinent provisions of the foregoing are set forth in the Appendix, *infra*, at pages 29 to 34.

Statement of the Case

The basic facts are undisputed. The mortgage recording taxes involved in this proceeding were paid under protest to the Clerk of Clinton County, New York, upon the recording in his office on May 13, 1957, of five mortgages dated May 6, 1957, of the total principal amount of $27,578,000. The total amount of the mortgage recording taxes paid was $137,890. The mortgages were executed to Chemical Corn Exchange Bank of New York by Platts-

burgh AFB Homes, Inc., Plattsburgh AFB Homes No. Two, Inc., Plattsburgh AFB Homes No. Three, Inc., Plattsburgh AFB Homes No. Four, Inc., and Plattsburgh AFB Homes No. Five, Inc.*

The mortgages were issued pursuant to the provisions of the National Housing Act which had been amended to enable the Department of Defense to provide urgently needed military housing, for which it lacked the necessary appropriated funds, by authorizing the Department to pay for the cost of the housing out of funds appropriated annually by Congress for quarters allowance for military personnel (12 U. S. C. 1748, *et seq.*; 42 U. S. C. 1594, *et seq.*; U. S. Senate Committee on Banking and Currency Report No. 2005 on the Housing Amendments of 1956, 84th Congress, 2d Session, p. 10; House of Representatives Committee on Banking and Currency Report No. 2363 on the Housing Act of 1956, 84th Congress, 2d Session, pp. 38, 39; Testimony before the subcommittee on Real Estate and Military Construction of the U. S. Senate Committee on Armed Services, 84th Congress, 1st Session, pp. 478-482). In other words, money appropriated by Congress annually for cash allowances to be made to military personnel in lieu of quarters would be used by the Department of Defense instead to provide the housing itself.

Pursuant to the National Housing Act, as so amended, the following procedure was followed:**

1. The Department of the Air Force of the United States of America issued an invitation for bids for the

* While this was a single project, covered by a single contract, it was divided into five lease and mortgage transactions. In each case the instruments used were identical except as to the respective lands affected and amounts of money involved. To reduce the record, counsel have agreed to refer only to the instruments which relate to the mortgage made by Plattsburgh AFB Homes, Inc. (R. pp. 30, 47).

** Pertinent provisions of the instruments used in the transaction appear in the Appendix at pages 35 to 39.

construction of an armed services housing project consisting of 1,685 family housing units to be constructed at Plattsburgh Air Force Base, New York (Appendix p. 35).

2. Petitioner's bid of $27,578,000 was accepted in a Letter of Acceptability which required the following acts to be performed:

A. The formation by the petitioner of five Delaware corporations with a paid-in capital of $1,000 each (Exhibit A, Exhs. p. 39[1a]).

B. A "closing" at which the following instruments were executed and delivered simultaneously:

(a) Each of the five corporations leased certain lands from the Air Force on the Plattsburgh Air Force Base for a total rent of $1,000, leaving each corporation with no assets except a lease which provided no revenue (Appendix p. 36).

(b) The petitioner and the five corporations entered into a housing contract with the Department of the Air Force for the sum of $27,578,000 to be completed not later than May 23, 1959 (Appendix p. 36).

(c) The five corporations entered into building loan agreements with the Chemical Corn Exchange Bank of New York for the total sum of $27,578,000 (Appendix p. 37) and at the same time executed and delivered to the said bank promissory notes of the total amount of $27,578,000 secured by mortgages on the leased premises (Appendix p. 38). The total amount so borrowed was paid to the petitioner (housing contract, Art. III, Exhs. p. 111).

(d) Payment of the mortgages was both guaranteed and undertaken by the Department of the Air Force. Payments begin July 1, 1959 (Appendix pp. 38, 39).

(c) All capital stock of the five corporations was assigned in blank and deposited in escrow with the Chemical Corn Exchange Bank for delivery to the Department of the Air Force upon completion of the project on or before May 23, 1959 (Appendix p. 40).

3. The petitioner paid a mortgage recording tax of $137,890 to the Clinton County Clerk upon recording the mortgages (Exhs. p. 173). It paid also the mortgage recording *fees* (Real Property Law, §291; C. P. A. §1554, 6; Exhs. p. 162G) which, admittedly, were due.

4. The mortgage recording tax was imposed and collected under Section 253 of the Tax Law of the State of New York and was paid by the petitioner under protest (Exhs. p. 174).

The petitioner's bid did not include the amount of the mortgage recording tax (Exhs. pp. 144, 145) which was mentioned for the first time in the building loan agreement executed at the time of closing (Exhs. p. 162G).

This proceeding was instituted on June 13, 1957, pursuant to §263 of the New York Tax Law, on the petitioner's application to the State Tax Commission for a refund on the ground that the tax herein was unconstitutional and "an unwarranted attempt to tax the means required to accomplish one of the mandates of the Federal Government to provide for national security and for the common defense" (Petition, Exhs. p. 10). The State Tax Commission denied the application (R. fols. 55-65).

Pursuant to Article 78 of the New York Civil Practice Act, the petitioner sought a review of the determination of the State Tax Commission at a Special Term of the New York Supreme Court (Albany County). The petition alleged that the tax was invalid as a tax imposed (a) upon lands owned by the United States, (b) on instrumentalities issued by the United States Government in the performance of its governmental duties, and (c) contrary

to the Constitution and laws of the United States of America (R. fols. 45-49). The Special Term affirmed such determination (R. fols. 10-15). Neither the State Tax Commission nor the Special Term wrote an opinion.

From the order of the Special Term, the petitioner appealed to the Appellate Division of the New York Supreme Court, Third Department, which affirmed the order of the Special Term with an opinion written by Mr. Justice Gibson. Copies of the order and opinion of the Appellate Division are included in the Record (fols. 109-137).

Thereafter, by permission of the New York Court of Appeals (R. fols. 106-108), the petitioner appealed to that Court from the decision of the Appellate Division and that decision was affirmed by the Court of Appeals, all concurring except VanVoorhis, J., dissenting. Copies of the opinions and order of the Court of Appeals appear in the Appendix hereto attached (pp. 21-28).

Reasons for Allowance of Writ

The decisions of the state courts in this proceeding are in conflict with decisions of this Court relating to the subject matter.

The rights, privileges and immunity claimed in this proceeding are in the field of intergovernmental taxation and depend for their recognition on the supremacy of federal over state law on a federal question. Since Chief Justice Marshall expounded the doctrine of the immunity of the federal government from state taxation when performing its constitutional duties in *M'Culloch v. Maryland*, 4 Wheat. 316, no federal right has been more zealously guarded. This proceeding concerns the effect of a state tax upon that right.

The project here is but one of many of similar kind authorized by the National Housing Act and the deter-

mination of the power of taxation of a state, with respect to such projects, is important to the federal and state governments.

Summary of Argument

The New York mortgage recording tax is, under Federal law, which applies to this proceeding, a property tax *on* the mortgages themselves, not a non-property tax on the privilege of recording them (Point II, *infra*), and, therefore, it has been imposed unlawfully in this case as follows:

a. On instrumentalities of the Federal Government, or its agencies, in violation of the immunity impliedly granted by the U. S. Constitution (Point I, *infra*);

b. On the interest of a lessee from the Federal Government in violation of the exemption expressly granted by the Capehart Act (Point III, *infra*);

c. On personal property which is expressly exempt under the Constitution and laws of the State of New York (Point IV, *infra*);

d. As a non-property tax on the use of tax-exempt property, assuming such use to have been present (Point V, *infra*).

ARGUMENT

POINT I

The mortgages were among the means and operations used by the Federal Government to carry out powers expressly or impliedly granted to it by Article I, Section 8, of the U. S. Constitution and the National Housing Act. They are immune from state taxation.

1. The means used.

Congress may use any appropriate means to carry out its governmental duties (*M'Culloch v. Maryland*, 4 Wheat. 316, 309, 410, 423).

The use made of the mortgages is to be ascertained from a construction of the authorizing statute and the instruments used in the transaction in the light of the surrounding circumstances and the end sought to be attained. *Bell v. Bruen*, 1 How. 169, 186; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 630; *Federal Land Bank v. Priddy*, 295 U. S. 229, 231, 232. And substance prevails over form.

The Department of Defense was charged with the duty of providing the housing; it contracted for its construction; the construction was paid for with the proceeds of the mortgages; the Department will own, operate and receive the income from the completed project; the Department agreed to and will pay the mortgages in full with funds provided by Congress for that purpose. 42 U. S. C. 1594, 1594b, 1594d; Appendix pages 30-32.

The arrangement was designed to aid the Government in financing the construction of urgently needed housing for military personnel of the armed services and not to accommodate the contractor. The fact that the contractor

may have also benefited did not affect the purpose of the transaction (*U. S. v. B. & O. R. R. Co.*, 17 Wall. 322, 331, 332; *Union Pacific R. R. Co. v. Peniston*, 18 Wall. 5, 42).

The scheme of financing contemplated was, as Assistant Secretary of Defense Floete testified before the Subcommittee on Military Construction of the Senate Armed Services Committee, "a supplemental approach" to provide military housing and "a better one" than trying to obtain an appropriation of "a billion dollars or so." Senator Jackson, a member of the committee, described the method as "fiction" and "only another one of those bookkeeping deals that we are setting up" (Report of Hearings, June 3, 1955, pp. 479-482).

Even though the mortgages may not come within the class of obligations of the U. S. which are expressly exempt from state taxation under R. S. 3701, 31 U. S. C. 742, they are, nevertheless, instrumentalities used by it to perform governmental functions, i. e., borrow money to provide for the common defense (cf. *Peo. ex rel. Astoria L. H. & P. Co. v. Gantor*, 236 N. Y. 417, 422). The mortgages were used by the United States "instead of money when full payment for supplies was impossible" (*Peo. ex rel. Banks v. Hoffman*, 7 Wall. 6, 26). The undertaking of the Department (Appendix, pp. 38, 39) expressly states that the mortgages secured notes given "for the advancement of moneys for the purposes of constructing the housing project. * * *"

> "* * * the maintenance of a coast guard service by the United States, is a governmental function; and that function extends * * * to the purchase of equipment and supplies needed to render the service efficient" (*Indian Motorcycle Co. v. United States*, 283 U. S. 570, 579).

2. The mortgages represent obligations of the Department of Defense.

It was never intended that the mortgagor corporations should pay the mortgages; they never had more than $1,000 each and after acquiring the leases they had no assets, except the leases which provided no income (Bldg. Loan Agt. par. 14, Exhs. p. 57; Lease, pars. 3, 5, Exhs. p. 157) and which were worthless as security. It was only the credit of the United States which gave the mortgages any value. The United States was the only party to the transaction which *could* pay $27,578,000.

Contrary to the usual insured or guaranteed mortgage loan, the mortgagors here had no assets (except a lease without value) or earning capacity and the Government knew in advance it would be obliged to pay the entire debt; the money borrowed on the mortgages was not used to enable the mortgagors to acquire property but to enable the Government to do so; after completion of the deal the Government will own everything and the mortgagors will own nothing more than they did before; in addition to insuring and guaranteeing the loan, the Department of Defense agrees to pay it and Congress will provide the funds with which to do so (42 U. S. C. 1594d). It is undisputed that the mortgages are to be paid by the Department of Defense from funds hereafter made available through Congressional appropriations (42 U. S. C. 1594b, 1594d; Appendix pp. 31-32).

Error in court below.

We do not predicate liability of the Department of Defense on the escrow agreement alone (Appendix p. 40), as the Court below inferred but also on the guaranty by the United States of an otherwise worthless debt incurred for its benefit and its unconditional promise, made at the time the debt was incurred, to pay it with funds ap-

propriated by Congress for the purpose (Appendix pp. 38, 39). The liability of the Department of Defense on the mortgages, at the time they were recorded, was absolute. The Court below did not refer to this complete undertaking of the Department in its recital of material facts (Appendix pp. 21, 22).

3. Concerning governmental agencies.

Regardless of their lack of value without the Government's agreement to pay them, the mortgages represented obligations of the mortgagor-corporations, which the Government had caused to be organized for its convenience and which had no other purpose than to finance the cost of military housing which the Government was obliged to provide, which it will own and for which it will pay. The acts of such corporations are the acts of the Government itself.

> "But where the General Government creates a corporation as a means of carrying out a national object, that corporation and its powers, property and faculties, employed in accomplishing the service, are the instrumentalities by which the government effects its objects. Hence the corporation is not taxable by state authority. And it matters not that private individuals are interested for their private gain in the stock of the corporation. Such individual interest may be taxable by itself, but the corporation and its property and operations cannot be, without interfering with the agencies used by the government for the accomplishment of its objects." *Union Pacific R. R. Co. v. Peniston*, 18 Wall. 5, 42.

> "The state claims the right to tax on the ground that taxation of the agency may be taxation of the means employed by the government, and invalid upon admitted grounds; but that taxation of the property of the agent is not taxation of the means. We agree that it 'is not always, or generally taxation of the means,' as said by Chief Justice Chase in *Thomson v. Union P. R. Co.*, 9 Wall. 579, 591.

> But it may be, and, in our opinion, clearly is, when, as here, not only the agent was created, but all the agent's property was acquired and used, for the sole purpose of producing a weapon for the war. This is not like the case of a corporation having its own purposes as well as those of the United States, and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends." *Clallam County v. United States*, 263 U. S. 341, 345.

These cases are to be distinguished from those where the corporations were created for commercial purposes or had interests other than serving the Government.

Error in court below.

Referring to the mortgagor-corporations, the New York Court of Appeals said:

> "They were created for a commercial purpose for private profit, as distinguished from a governmental purpose. In the absence of statute to the contrary, it may not be assumed that a governmental function was involved. They possess all of the requisites and responsibilities of corporate existence and, as such, are an entity separate and apart from the United States * * *" (Appendix p. 24).

The only commercial organization engaged in the described activities and the only one which could make a profit was the petitioner (the eligible builder). The mortgagor-corporations were entities entirely separate and apart from the petitioner and they should not be confused with it. The petitioner did not sign the mortgages or, like the government, agree to pay them.

The mortgagor-corporations were organized for limited purposes: To accept the leases of government land, to enter into building and loan contracts with a private

lending institution, to execute bonds and mortgages for the entire contract price and to pay such funds over to the petitioner. They retained nothing. They did not possess "all of the requisites" of corporate existence. The stock was in escrow for the benefit of the Government; the officers' and directors' resignations had been required; the corporations had used their entire capital for the leases; they owned nothing else; they will receive no income under the leases or otherwise and no profits are possible. The activities of the mortgagor-corporations were confined to assisting the Government to finance a necessary governmental project for which the Government, from the beginning, was required and had agreed to pay.

The fact that they were also entities separate from the United States does not mean that they were not agencies of the Government (*Sloan Shipyards Corp. v. U. S. Shipping Board, etc.*, 258 U. S. 549, 567). The question is not who owned the stock but whether the corporations were "essential to the beneficial exercise of (Governmental) functions." Were they the means by which the Government accomplished its object? *M'Culloch v. Maryland*, 4 Wheat. 316, 408-415; *Union Pacific R. R. Co. v. Peniston*, 18 Wall. 5, 42; *Clallam County v. United States*, 263 U. S. 341, 345.

The "statute to the contrary," required by the New York Court of Appeals, is the National Housing Act which authorized the procedure followed here by the Department of Defense to provide the "urgently needed military housing."

4. Federal immunity from state taxation.

Federal instrumentalities are, without the express consent of Congress, immune from state taxation.

M'Culloch v. Maryland, 4 Wheat. 316;
U. S. v. County of Allegheny, 322 U. S. 174.

POINT II

The New York mortgage recording tax is, in this proceeding, a property tax on the mortgages.

A Federal question is present since all of the contract documents relate to the same Federal transaction and are to be construed together in ascertaining the relationship of the parties in interest. *Conrad v. Atlantic Ins. Co. of N. Y.*, 1 Pet. 386, 438; *Swain v. Seamens*, 9 Wall. 254, 265; *Joy v. City of St. Louis*, 138 U. S. 1, 41; *Ambrosini v. U. S.*, 187 U. S. 1, 7. Moreover, by their very provisions they are complimentary and "what is called for by one shall be deemed called for by all" (Housing Contract Exhs. p. 120, par. 2, a; Inv. for Bids, Exhs. p. 19, par. 1). The mortgages are not, as respondent contends, independent documents "private in character" to be isolated from those simultaneously executed which accompanied the transaction.

Federal law, therefore, controls. This is the decisive factor in this whole proceeding.

> "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. * * *
>
> "'Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' *Carpenter v. Shaw*, 280 U. S. 363, 367, 368." *U. S. v. County of Allegheny*, 322 U. S. 174, 183, 184.

Under Federal law a mortgage recording tax similar to the one imposed here is a property tax even when it is designated in the state statute a privilege tax. *Fed-*

eral Land Bank v. Crosland, 261 U. S. 374; *Pittman v. Home Owners Loan Corp.*, 308 U. S. 21. The fact that in these two cases the mortgages were declared by statute to be federal instrumentalities (an alleged distinction made in the Court below) is irrelevant to the discussion. The issue in the *Crosland* and *Pittman* cases was not the nature of the instrumentalities but rather the nature of the mortgage recording tax and the mortgages were held to be exempt only because the tax, although called a privilege tax, was a tax *on* the mortgages—a property tax—and not an excise tax on the privilege of recording.

> "The question there (*Federal Land Bank v. Crosland*) related to a tax imposed by Alabama as a condition for the recording of a mortgage executed to a Federal Land Bank * * *. We held that the state tax, as distinguished from a reasonable fee to meet the expenses of the registry, constituted a general tax on mortgages using the condition attached to registration as a practical mode of collecting it, and that the tax on the mortgage in question was beyond the power of the State. * * * We said that 'whoever pays it it is a tax upon the mortgage and that is what is forbidden by the law of the United States.' 261 U. S. pp. 378, 379. Here, also, the tax is imposed upon the mortgage and is graded according to the amount of the loan, and the condition attached to the registration is a practical method of collection" (*Pittman v. Home Owners Loan Corp.*, 308 U. S. 21, 30, 31).

Error in court below.

The law of the State of New York as laid down in *Franklin Society v. Bennett*, 282 N. Y. 79, app. dismd. 309 U. S. 640 (that the tax is a non-property tax), has no application to this Federal proceeding. The appeal in that case to this Court was dismissed "for want of a substantial Federal question."

POINT III

The mortgages on the leaseholds are *ipso facto* exempt from state taxation under the provisions of the Capehart Act.

Section 511 of the Housing Act of 1956 amended Section 408 of the Housing Amendments of 1955, effective August 11, 1955 (42 U. S. C. 1594, Historical Note; Appendix pp. 32, 33) and, therefore, this transaction which occurred in May, 1957, is governed by the amendment which exempts the "interest of a lessee" from state or local taxes. The mortgages here, to have been subject to the mortgage recording tax, must have imposed a lien on or affected the title to real property (New York Tax Law, §250; Appendix pp. 33, 34). In New York the interest of the lessee is considered real property (R. P. Law, §290); consequently, the tax *on* the mortgages is a tax on or which affects the interest of the lessee and violates the provisions of §511. The lower Court disregarded the amendment applying to leases made after August 11, 1955.

Error in court below.

In *Offhut Housing Co. v. Sarpy County*, 351 U. S. 253, cited by the Court below, the lease was made in 1951 under the "Wherry Act"; here the leases were made under the "Capehart Act" after August 11, 1955, when the amendment exempting the leaseholds from state taxes became effective. The section of the House Report #2363 (pp. 48-49) cited by the Court below is entitled "Taxation of Wherry Act Leaseholds."

The vast difference between the financing of "Wherry" projects and the financing of "Capehart" projects is explained in the Report of U. S. Senate Comm. on Banking and Currency, No. 404, p. 18. See also 42 U. S. C. 1594a

Act "as in effect prior to August 11, 1955." The distinction was made clear in the dissenting opinion of Judge Van Voorhis (Appendix p. 25).

POINT IV

The mortgages were personal property and, therefore, exempt from the state mortgage recording tax.

A mortgage is personal property both under the state law (Tax Law, §2 [8]) and the Federal Law (*Terrell v. Allison*, 88 U. S. 289, 292, 293; Pomeroy Eq. Jur. [5th ed.] §§1188-1188a). A tax against personal property in New York is prohibited by statute as well as by the State Constitution (Tax Law, §3; *Franklin Society v. Bennett*, 282 N. Y. 79, app. disd. 309 U. S. 640; *Mtr. of Grumman Corp. v. Bd. of Assessors*, 2 N. Y. 2d 500, 507, cert. denied 355 U. S. 814, 885). The tax herein, therefore, violated the "due process" clause of the U. S. Constitution (Amt. XIV; *Dawson v. Kentucky D. & W. Co.*, 255 U. S. 288, 294, 295). See Appendix pp. 29, 33.

Error in court below.

The New York Court of Appeals admitted that "a mortgage is personal property and may no longer be subjected to a property tax" but said, "Tax Law §253 is not a tax on property but on the privilege of recording the mortgage" (Appendix p. 24). Its characterization of the tax, however, cannot, in this proceeding, prevail over a different one given to it by the United States Supreme Court (see Point II, *supra*).

POINT V

***United States (Borg-Warner Corporation) v. City of Detroit*, 355 U. S. 466, bears no relation to the question involved in this proceeding. There is no use tax in New York. The tax involved here is a property tax.**

In *U. S. v. County of Allegheny*, 322 U. S. 174, this Court held that a property tax could not be imposed on the beneficial use of tax-exempt property but left undecided the question whether the exercise of such a privilege could be taxed by a state "by appropriate proceedings" (*id.* p. 186). Later, in the *Borg-Warner* case, this Court held that the State of Michigan had met the requirement of "appropriate proceedings" by enacting a statute expressly authorizing a *non-property* tax on such use. However, "There is no New York State statute comparable to this Michigan act" (*Mtr. of Fort Hamilton Manor v. Boyland*, 4 N. Y. 2d 192, 197). Even if there were, it would not authorize the *property* tax imposed herein under an entirely different statute.

Therefore, while asserting that the mortgages here were being used by the Government itself but assuming, *arguendo*, that they are considered to be among the means used by the mortgagor-corporations to perform a contract with the Federal Government, we say that such use is also exempt from the mortgage recording tax imposed by Section 253 of the New York State Tax Law. That tax is neither a "use" tax nor a "privilege" tax but a *property* tax on the mortgages themselves (Point II, *supra*).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

HAROLD A. JERRY,
CLYDE A. LEWIS,
Attorneys for Petitioner.

Dated: June 24, 1959.

APPENDIX

Opinions of Court Below

(5 N. Y. 2d 635)

In the Matter
of
S. S. Silberblatt, Inc.,
Appellant,
against
Tax Commission of the State of New York,
Respondent.

Decided April 17, 1959.

Dye, J. This appeal presents a problem of intergovernmental tax immunity with specific reference to the right of the State to impose a mortgage recording tax on mortgages given by private corporations on lands leased from the Federal Government.

The facts giving rise to the problem supply the answer. On January 14, 1957 the Department of the Air Force, U. S. A., through the Contracting Officer of Plattsburgh Air Force Base, issued an invitation for bids for the construction, through Federal Housing Administration insured mortgage financing, of an Armed Services housing project at Plattsburgh Air Force Base, consisting of 1,685 on-base family units. The petitioner, as low bidder, was awarded the contract for the sum of $27,578,000. The procedure employed to carry out this contract was as complicated as the objective was simple. The petitioner, upon being awarded the contract, formed five Delaware corpo-

rations with paid-in capital stock of $1,000 each, of which the petitioner was the sole stockholder. Each of the five corporations leased certain described lands at the Plattsburgh Air Force Base for a term of 55 years, paying as a total rent under each lease the sum of $1,000. The five corporations then borrowed $27,578,000 from the Chemical Corn Exchange Bank of New York, evidenced by their promissory notes, and secured by five mortgages on the leased premises. When the five mortgages in varying amounts of principal aggregating $27,578,000, each dated May 6, 1957, were presented to the Clinton County Clerk for recordation, he demanded recording fees, which admittedly were due (Real Property Law, §291; Civ. Prac. Act, §§1554-1556) and a mortgage recording tax, aggregating $137,000, which the petitioner as "eligible builder" paid under protest (Tax Law, §253). In its demand for refund, the petitioner-appellant challenges the validity of the tax as having been imposed upon lands and obligations of the Federal Government and upon instrumentalities used by the Government in carrying out its functions and, more specifically, because the tax in question violates section 511 of the Housing Act of 1956 (cf. U. S. Code [1952 ed., Supp. V, p. 2802], §1594, "Savings Provisions").

We do not read section 511 of the Housing Act of 1956 as providing immunity from payment of the challenged mortgage recording tax. Quite obviously, that statute concerns itself with the exemption from a property tax or assessment by a State or local government upon the leasehold interest of a lessee of lands from the Federal Government (see U. S. Code, tit. 12, §§1748-1748h; House Report, No. 2363, 84th Cong., 2d Sess., pp. 48-49). The issue of the vulnerability of a leasehold to a local property tax was decided and sustained in *Offutt Housing Co. v. Sarpy County* (351 U. S. 253).

Section 253 of the Tax Law imposes a recording tax upon every mortgage at the rate of "fifty cents for each one hundred dollars and each remaining major fraction

thereof of principal debt or obligation which is * * * secured * * * by a mortgage on real property situate within the state." We have long since determined that the mortgage recording tax is not a tax on property, but a tax upon the privilege of recording a mortgage which in no way conflicts with the provisions of the New York Constitution (art. VI, §3) or with the United States Constitution (14th Amdt., §1) (*Franklin Soc. v. Bennett*, 282 N. Y. 79, appeal dismissed 309 U. S. 640). We conclude, therefore, that the immunity envisioned by section 511 of the Housing Act of 1956 has no applicability here.

Likewise, we must reject appellant's contention that the subject mortgages, as direct obligations to the United States, are immune from State or local taxation, as provided in section 3701 of the Revised Statutes of the United States (U. S. Code, tit. 31, §742) which exempts "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States" since they are not "of the same type as those specifically enumerated" in the statute (*Smith v. Davis*, 323 U. S. 111, 117). Under the arrangement authorized by the Enabling Act, it is clear that the device employed was designed to relieve the Government of its financially burdensome obligation to provide housing for its military personnel and at the same time avoid increasing the national debt. It did not pledge its credit in the usual sense, but merely guaranteed each "periodic payment" based on a monthly average of $90 per family unit.

The appellant's contention that this petitioner and the five corporate mortgagors are instrumentalities of the Federal Government or its agencies and, as such, are exempt from State and local taxation, is without substance. The cases relied on (*Federal Land Bank v. Crosland*, 261 U. S. 374, and *Pittman v. Home Owners' Corp.*, 308 U. S. 21) are inapplicable since they turned on Federal statutes which expressly declared the Federal Land Bank and the Home Owners' Loan Corporation to be Federal instru-

mentalities. At the time of the execution, delivery and recording of these mortgages, each of the mortgagors was a private corporation, all of the capital stock of which was privately owned. They were created for a commercial purpose for private profit, as distinguished from a governmental purpose. In the absence of statute to the contrary, it may not be assumed that a governmental function was involved. They possess all of the requisites and responsibilities of corporate existence and, as such, are an entity separate and apart from the United States (*United States v. Strang*, 254 U. S. 491) and this is so, notwithstanding the fact that all of the capital stock of each corporation will ultimately be owned by the Federal Government (*Sloan Shipyards v. United States Fleet Corp.*, 258 U. S. 549). Accordingly, we conclude that the five mortgagors were not instrumentalities of the Federal Government at the time of the recording.

We are also obliged to reject the appellant's remaining contention that the mortgage recording tax, as here imposed, amounted to a tax on personal property which is exempt from taxation in New York (Tax Law, §2; *Matter of Fort Hamilton Manor v. Boyland*, 4 N. Y. 2d 192 [holding that a leasehold interest as a chattel real was exempt]). While a mortgage is personal property and may no longer be subjected to a property tax, it nonetheless is a misconception of the State Tax Law to say that a recording tax is a tax on property or an interest in property, either as personalty or as realty because it covers land. As we have already said, section 253 of the Tax Law is not a tax on property but a tax on the privilege of recording the mortgage. The United States Supreme Court has recently refused to invalidate an expressly authorized non-property tax under an otherwise valid statute or extend the Government's constitutional immunity to shield private parties therefrom, merely because part or all of the financial burden eventually falls on the Government, for to do so would improperly impair

the taxing power of the State (*United States v. City of Detroit*, 355 U. S. 466 [1958]).

The order of the Appellate Division should be affirmed, with costs.

Chief Judge Conway and Judges Desmond, Fuld, Froessel and Burke concur with Judge Dye; Judge Van Voorhis dissents and votes to reverse and to annul and refund the mortgage recording tax in the following memorandum: Although under our State law the tax is imposed upon the recording of the mortgage (*Franklin Soc. v. Bennett*, 282 N. Y. 79), this case is controlled by Federal law under which the tax is on the mortgage itself, which is a Federal instrumentality exempt from State taxation (*Federal Land Bank v. Crosland*, 261 U. S. 374; *Pittman v. Home Owners' Corp.*, 308 U. S. 21; Housing Act of 1956, §511, U. S. Code [1952 ed., Supp. V, p. 2802], tit. 42, §1594, Historical Note, Savings Provisions). Unlike the Wherry Act, the Capehart Act, under which this military housing project was authorized, renders petitioner-appellant merely a builder and not a private sponsor of the military housing. The United States, through its Department of Defense, is the sponsor, financier and owner of the entire project. The mortgagor corporations are mere fictions, and they and the mortgagee banks had no other function in this business than to act as agents for the Federal Government (*Clallam County v. United States*, 263 U. S. 341, 345; *Railroad Co. v. Peniston*, 18 Wall. [85 U. S.] 5, 42). The situation is, therefore, the same, in legal effect, as though the mortgages ran to the Federal Land Bank or the Home Owners' Loan Corporation, where State mortgage recording taxes were held to be invalid in the *Crosland* and *Pittman* cases above cited.

Order affirmed.

Judgment of New York Court of Appeals

COURT OF APPEALS.

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 17th day of April, in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

WITNESS,

The HON. ALBERT CONWAY, Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

REMITTITUR—April 17, 1959.

No. 51.

IN THE MATTER

of

The Application of S. S. SILBERBLATT, Inc.,

Appellant,

For a Review of Determination of THE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondent,

Pursuant to Article 78 of the Civil Practice Act.

BE IT REMEMBERED, That on the 9th day of February in the year of our Lord one thousand nine hundred and

fifty-nine, S. S. Silberblatt, Inc., the appellant—in this cause, came here unto the Court of Appeals, by Harold A. Jerry and Clyde A. Lewis, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The Tax Commission of the State of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Harold A. Jerry, of counsel for the appellant, and by Mr. Julius L. Sackman, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which

record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, April 17, 1959.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in [SEAL] said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk

Pertinent Provisions of Constitutional Provisions and Statutes Involved

U. S. Constitution, Article I, Section 8:

"The Congress shall have power to * * * provide for the common defense * * * borrow money on the credit of the United States * * * raise and support armies * * * make rules for the government and regulation of the land and naval forces * * * make all laws which shall be necessary and proper for carrying into execution the foregoing powers. * * *"

U. S. Constitution, Amendment XIV:

"* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

Housing Amendments of 1955 (P. L. 345; Chap. 783) as amended by the Housing Act of 1956 (P. L. 1020, Chap. 1029):

12 U. S. Code §1748d. Lease of property; terms and conditions

Whenever the Secretary of the Army, Navy or Air Force determines that it is necessary to lease any land held by the United States on or near a military installation to effectuate the purposes of this subchapter, he may lease such land upon such terms and conditions as will, in his opinion, best serve the national interest. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

42 U. S. Code §1594. Contract for construction—Contract provisions; competitive bids

(a) The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section. Before the Secretary shall enter into any contract as authorized by this section for the construction of housing, he shall

invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41.

(b) * * *

Acquisition of capital stock of property covered by mortgage

(c) Northwithstanding any other provision of law, the Secretary of Defense or his designee is authorized to acquire the capital stock of mortgagors holding property covered by a mortgage insured under sections 1748-1748g and 1748h-1 of Title 12, and to exercise the rights as holder of such capital stock during the life of such mortgage and, upon the termination of the mortgage, to dissolve the corporation; to guarantee the payment of notes or other legal instruments required by the Commissioner of such mortgagors; to make payments thereon; and to guarantee and indemnify the Armed Services Housing Mortgage Insurance Fund against loss in cases where so required. All housing facilities placed under the control of the Secretary of Defense pursuant to the provisions of this subchapter shall be deemed to be housing facilities under the jurisdiction of the military department to which they are assigned.

42 U. S. Code §1594b. Maintenance and operation of housing; use of quarters; payment of principal, interest and other obligations

The Secretary of Defense or his designee is authorized to maintain and operate any housing acquired under this subchapter and assign quarters therein to military and civilian personnel and their dependents. Appropriations for quarters allowances or appropriate allotments, and rental charges

to civilian personnel, may be utilized by the military department concerned for the payment of principal, interest and other obligations, except those of maintenance and operation, of the mortgagor corporation with respect to such housing projects. Such payments shall not exceed an average of $90 a month per housing unit and total payments for all housing so acquired shall not exceed $21,000,000 per month: *Provided*, That, in case of the United States Coast Guard, total payments for all housing so acquired shall not exceed $90,000 per month.

42 U. S. Code §1594d. Appropriations; use of quarters allowances

(a) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of sections 1594-1594c of this title.

(b) Any funds heretofore or hereafter authorized to be expended by any of the military departments or the Coast Guard for the payment of allowances for quarters for military personnel may be used for the purposes specified in subsection (a) of this section.

42 U. S. Code §1594, Historical Note, Savings Provisions.

Section 408 of the Housing Amendments of 1955 was amended by Section 511 of the Housing Act of 1956 by adding at the end thereof the following:

"Nothing contained in the provisions of Title VIII of the National Housing Act in effect *prior* to August 11, 1955 (12 U. S. Code §§1748-1748h), or any related provision of law, shall be construed to exempt from state or local taxes or assessments the interest of a lessee from the Federal

Government in or with respect to any property covered by a mortgage insured under such provisions of Title VIII: provided * * * that the provisions of this section shall not apply to properties leased pursuant to the provisions of Section 805 of the National Housing Act as amended on or *after* August 11, 1955 (12 U. S. Code §1748d), which properties shall be exempt from state or local taxes or assessments." (Italics supplied.)

Tax Law of the State of New York:

§2. Definitions

8. The terms "personal estate," and "personal property," as used in this chapter, include chattels, money, things in action, debts due from solvent debtors, whether on account, contract, note, bond or mortgage; debts and obligations for the payment of money due or owing to persons residing within this state, however secured or wherever such securities shall be held; * * *

§3. Property liable to taxation

* * * Notwithstanding any provision of this chapter, or of any other general, special or local law to the contrary, personal property, whether tangible or intangible, shall not be liable to taxation locally for state or local purposes. * * *

§250. Definitions

* * * The term "mortgage" as used in this article includes every mortgage or deed of trust which imposes a lien on or affects the title to real property, * * *

§253. Recording tax

A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state recorded on or after the first day of July, nineteen hundred and six, is hereby imposed on each such mortgage, and shall be collected and paid as provided in this article. If the principal debt or obligation which is or by any contingency may be secured by such mortgage recorded on or after the first day of July, nineteen hundred and seven, is less than one hundred dollars, a tax of fifty cents is hereby imposed on such mortgage, and shall be collected and paid as provided in this article.

Pertinent Provisions of Exhibits.

The invitation for bids (Exhibit A, Exhs. pp. 13-109).

The Invitation for Bids states that it was issued pursuant to Title IV of the Housing Amendments of 1955, approved August 11, 1955 (P. L. 345, 84th Congress; 69 Stat. 635 as amended, P. L. 1020, 84th Congress, approved August 1, 1956), commonly known as the "Capehart Act," which authorized the acquisition of vitally-needed family housing by the Military Departments, and explains in detail the procedure to be followed and has attached to it specimen forms of the numerous instruments to be used in carrying out the project. It refers to the authorizing statute as follows:

> "The Statute contemplates that housing projects be constructed on Government-owned property, pursuant to competitive bidding by private contractors using FHA mortgage financing and certain guaranties of the Military Departments. The Statute further contemplates that upon completion of a project the Military Department will undertake the amortization of the mortgage indebtedness including the payment of interest thereon by the use of annual appropriations for quarters allowances and will also undertake the maintenance and operation of such housing" (Exhs. p. 17).

The only reference to taxes contained in the invitation for bids is the following:

> "16. Nothing in this Invitation for Bids shall be deemed to relieve the eligible builder for the payment of sales or use taxes properly levied" (Exhs. p. 24).

The leases (Exhibit G, Exhs. pp. 155-162).

Each lease was made under the authority of §805 of the National Housing Act as amended by §401 of the Housing Amendments of 1955 (69 Stat. 651) after the Secretary of the Air Force had determined that the lease was necessary to effectuate the purposes of Title IV of the Housing Amendments of 1955 (69 Stat. 646-654). Each runs for 55 years, subject to earlier termination by the Air Force under certain conditions. The total rental for each lease was $1,000.

The lease also provides, among other things, "that the lessee shall place each housing unit in the project under the control of the Air Force as soon as it is available for occupancy." It provides no income for the lessee (see building loan agreement, Exhs. p. 57 [14]).

The housing contract (Exhibit B, Exhs. pp. 110-144).

This required complete performance within 730 calendar days from May 23, 1957 (Art. II). It established the contract price at $27,578,000 and required the five corporations to pay to petitioner the full proceeds of the mortgages (Art. III). We quote the following from the Housing Contract:

> Article XVI Payment of the Mortgage Notes (p. 118)
>
> (28) Each mortgagor-builder, simultaneous with the delivery of this Housing Contract, shall enter into a Building Loan Agreement, referred to in Article V hereof, in form and containing terms acceptable to the Department and the Commissioner, sample copy of which has been furnished the eligible builder.
>
> (29) The Department shall, to the extent that advances made against the mortgage note (identified

in the Building Loan Agreement above referred to) have been approved by the Commissioner, make payments in accordance with the terms of said note, provided that this obligation to make payments shall not become effective until the Commissioner shall have finally endorsed said note for mortgage insurance, or upon complete termination of the Housing Contract for the convenience of the Department prior to completion of the project. The Department shall, upon the initial endorsement by the Commissioner of said note for mortgage insurance, deliver to the Mortgagee, its guaranty of the payment of said note.

Article XIX Real and Personal Property Taxes During Construction (p. 119)

(33) * * * it is contended that this project is not subject to local real or personal property taxes.

41. Federal, State and Local Taxes (Except Real and Personal Property Taxes) (Exhs. p. 136):

(b) Except as may be otherwise provided in this Housing Contract, the contract price includes all Federal, State and local taxes and duties in effect and applicable to this Housing Contract on the contract date, except taxes from which the eligible builder or the transactions or property covered by this Housing Contract are then exempt. * * *

The building loan agreement (Exhibit A, Exhs. p. 57).

(14) The mortgagee understands that each housing unit will be placed under the control of the Department when such unit is determined by the Contracting Officer and the Commissioner to be available for occupancy and that the mortgagor-builder will receive no rents from the project.

The notes and mortgages (Exhibit D, Exhs. pp. 147, 167)

Each carried 4% interest and was payable as follows:

Interest alone on June 1, 1957, and on the first day of each succeeding month to and including June 1, 1959; thereafter commencing on July 1, 1959, and continuing monthly thereafter, stated installments of both interest and principal to be paid until the entire indebtedness shall be paid not later than June 1, 1984. The privilege is reserved to pay the debt in whole or in part prior to maturity. The mortgages were on the leaseholds.

Guaranty and undertaking with respect to mortgage payments (Exhibit E, Exhs. p. 149).

> "Whereas, under the terms of a certain Housing Contract entered into on the 6th day of May, 1957, by and among the Department, Plattsburgh AFB Homes, Inc., a Delaware corporation (hereinafter referred to as the 'mortgagor-builder'), and S. S. Silberblatt, Inc. (hereinafter referred to as the 'eligible builder'), the Department has agreed, among other things, to guarantee payment of the note of the mortgagor-builder executed pursuant to said Housing Contract to the extent that advances made against said note have been approved by the Federal Housing Commissioner:
>
> "Now, Therefore, in consideration of the material provisions contained in said Housing Contract and obligations thereby created among the parties thereto the Department hereby guarantees and undertakes, in accordance with the provisions of Title IV of the Housing Amendments of 1955 (Public Law 345, 84th Congress; 69 Stat. 635, as amended) and the provisions of said Housing Contract, as follows:

"1. The Department guarantees to the payee of said note (said payee being hereinafter referred to as the 'mortgagee') and to the Federal Housing Commissioner, as their interests may appear, the payment in accordance with the terms of said note, of said advances and interest thereon, said note being secured by a first mortgage or deed of trust insured by the Federal Housing Commissioner under the provisions of Title VIII of the Federal Housing Act, as amended, for the advancement of moneys for the purposes of constructing the housing project covered by said Housing Contract and consisting of 372 housing units on a site at Plattsburgh Air Force Base, New York, provided that, this guaranty shall become effective only upon the final endorsement by the Federal Housing Commissioner of said note for mortgage insurance or upon termination of the Housing Contract at the convenience of the Department prior to completion.

"2. The Department will, subject to the conditions stated in the foregoing guarantee, make each periodic payment becoming due to the mortgagee on said note in accordance with the terms thereof without any requirement that the mortgagee shall have made a prior demand to the mortgagor-builder for such payment.

* * * * * * *"

The condition precedent to the effectiveness of the undertaking had been fulfilled in advance. Prior to the "closing", the Federal Housing Commissioner had issued a "commitment for mortgage insurance" (Lease, Exhs. p. 157 [2]; Housing Contract, Exhs. p. 111) and at the "closing", when all of the contract documents were signed (p. 5, *supra*), he initially endorsed the notes for mortgage insurance (form, Exhs. p. 148; Housing Contract, Exhs. p.

118 [29]; Bldg. Loan Agt., Exhs. p. 162A). He was obligated to furnish his final endorsement upon completion of the project (12 U.S.C. 1748b [a], [j]; Housing Contract, Exhs. p. 118 [25]).

The stock escrow agreements, Exhibit F (Exhs. p. 153).

These required the petitioner, as sole stockholder of the five Delaware corporations, to deposit in escrow with the mortgagee (Chemical Corn Exchange Bank) all certificates of capital stock of the corporations endorsed in blank with the resignation of all the officers and directors thereof for delivery to the United States of America upon completion of the project (not later than May 23, 1959 and before the first principal payment on the mortgages becomes due (July 1, 1959).

Writ of Habeas Corpus

Petition for Writ of

Habeas Corpus

FILE COPY

Office Supreme Court, U.S.
FILED
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 162

In the Matter
of
S. S. SILBERBLATT, INC.,
Petitioner,

vs.

THE TAX COMMISSION OF THE STATE
OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 162

In the Matter
of
S. S. SILBERBLATT, INC.,
Petitioner,

vs.

THE TAX COMMISSION OF THE STATE OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The respondent held, without opinion, that the mortgages involved herein were subject to the mortgage recording tax imposed by Article Eleven of the New York Tax Law; the determination of the recording officer was ratified and confirmed, and the application of the petitioner for refund of the taxes which it had paid under protest was denied (R. fols. 63-65).

Upon judicial review of the respondent's determination, under Article 78 of the New York Civil Practice Act, the

New York Supreme Court, Special Term, without opinion, affirmed the determination and dismissed the petition (R. fols. 55-65). The Appellate Division of the New York Supreme Court unanimously affirmed the decision of Special Term, its opinion being reported at 6 A. D. 2d 603 (R. fols. 115-137).

The Court of Appeals of the State of New York affirmed the decision of the Appellate Division in an opinion reported at 5 N. Y. 2d 635; Judge Van Voorhis wrote a dissenting memorandum (See Appendix to Petition herein, pp. 21-25).

Jurisdiction

The grounds on which the jurisdiction of this Court is invoked are set forth in the petition.

Question Presented

May the State of New York constitutionally impose a mortgage recording tax upon the recording of a mortgage made by a private mortgagor to a private mortgagee covering a tax-exempt leasehold of Federal property?

Statutes, Regulations and Reports Involved

Involved in this application are:

12 U. S. C. § 1748d;

31 U. S. C. § 742;

42 U. S. C. § 1594;

Code of Federal Regulations, Title 24, Chap. II, Subchapter M. §§ 292a.14, 292a.23, 292a.24, 292a.35, 292a.38;

Congressional Report of Committee on Banking and Currency (H. R. 11742 [84th Congress, 2nd Sess., House Report No. 2363]);

New York Real Property Law § 290;

New York Tax Law §§ 4, 250, 253.

The pertinent provisions of the foregoing are set forth in the Appendix to this brief.

Statement

The mortgage recording taxes involved in this proceeding were collected upon the recording of five mortgages which affect the leases upon the Armed Services Housing Project, embracing 1685 family housing units, to be constructed at Plattsburgh Air Force Base in New York.* The project was initiated by the issuance on January 14, 1957 by the Department of the Air Force of an "Invitation For Bids". The "Invitation For Bids" was issued pursuant to Title IV of the Housing Amendments of 1955, approved August 11, 1955 (P. L. 345, 84th Congress; 69 Stat. 635 as amended, P. L. 1020, 84th Congress, approved August 1, 1956). The authorizing statute, in the words of the "Invitation", contemplated

> "that housing projects be constructed on Government-owned property, pursuant to competitive bidding by private contractors using FHA mortgage financing and certain guaranties of the Military Departments. The Statute further contemplates that upon completion of a project the Military Department will undertake the amortization of the mortgage indebtedness including the payment of interest thereon by the use of annual appropriations for quarters allowances and will also undertake the maintenance and operation of such housing" (Ex. A, Invitation For Bids; Exs. p. 17).

* Since all of the instruments in connection with the five mortgage transactions are identical, except as to the respective properties affected and the amounts involved, counsel have agreed, in order substantially to reduce the record, to refer only to the instruments which deal with the mortgage made by Plattsburgh AFB Homes, Inc.

The procedure to accomplish the purposes of the statute and the relationships by and between the parties in interest may be outlined as follows:

(a) The Department of the Air Force issues an Invitation For Bids and receives bids.

(b) After consultation with the Federal Housing Commissioner the Department accepts the lowest acceptable bid from a qualified bidder ("eligible builder") by the issuance of a "Letter of Acceptability";

(c) That letter requires the eligible builder, among other things, to take four actions:

(1) To form five new corporations to be known as mortgagor-builders;

(2) To arrange financing for the cost of the total project, including profit, by building-loan agreements between the mortgagor-builders and mortgage lenders;

(3) To cause each mortagee to obtain a commitment for FHA insurance;

(4) To execute a seven-party "Housing Contract" which defines the rights and obligations of the Department, the eligible builder and the five mortgagor-builders.

(d) Thereafter the parties in interest effect a "closing" in which the relatfonships of the parties are definitely established by the delivery of all legal instruments. Among other things at the closing, each mortgagor-builder receives a lease from the Department, enters into a building-loan agreement with the mortgagee, delivers to the mortgagee a note and mortgage, and the eligible builder (who is th sole owner of the capital stock of each of the mortgagor-builders) deposits the capital stock in escrow

with the mortgagee for ultimate delivery to the Department in accordance with the escrow agreements.

(e) Pursuant to the Housing Contract the eligible builder thereupon proceeds with the construction and is paid out of the mortgage proceeds. As construction progresses individual housing units are placed under the control of the Department as and when available for occupancy.

(f) Upon completion of the project the capital stock of the mortgagor-builders is delivered to the Department by the mortgagee as escrow agent and payment of the indebtedness of the mortgagor-builder is undertaken by the Department (Ex. A. Invitation For Bids; Exs. pp. 17-18).

Reasons for Denying Petition for Certiorari

Although it cannot be denied that a Federal question is present in this case, the question is one that is merely formal in character, having no substantiality whatsoever by reason of the fact that prior decisions of this Court leave no room for real controversy with respect to any of the points raised by the petitioner. The case does not meet the standard set up by this Court in its Rule 19(1)(a). (See also: *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 310-311, 314-315 [1902]; *Zucht* v. *King*, 260 U. S. 174 [1922]; *Palmer Oil Corp.* v. *Amerada Corp.*, 343 U. S. 390 [1952].)

Summary of Argument

The New York State mortgage recording tax is an excise tax imposed upon the privilege of recording a mortgage (Point I, *infra*).

The mortgages involved herein have not been statutorily exempt from payment of the mortgage recording tax (Point II, *infra*).

The mortgages involved herein have not been impliedly exempt from payment of the mortgage recording tax.

(a) Neither the petitioner nor the five mortgagors are instrumentalities of the United States engaged in the conduct of an essential or usual governmental function.

(1) Immunity from taxation extends only to agencies and instrumentalities engaged in the usual governmental functions.

(2) The functions of the petitioner and the five mortgagors are not essentially, usually, or traditionally governmental in character, but are commercial and proprietary.

(3) The fact that the five mortgagors will ultimately be wholly owned, through stock-ownership, by the Federal government does not render the mortgagors instrumentalities of the Federal government at the present time because presently they are private corporations the stock of which is privately owned. Even present stock ownership by the government would not result in tax exemption.

(b) Immunity is not impliedly extended to a mortgage recording tax by reason of the fact that the property affected by the mortgage has an exempt status.

(c) Immunity from payment of property tax does not imply immunity from payment of non-property tax.

(d) The fact that the burden of the tax may fall upon the Federal government does not create tax immunity (Point III, *infra*).

This Court has recently declared that the trend has been to reject, as a matter of constitutional law, the extension of tax immunity to private persons from non-discriminatory State taxes (Point IV).

ARGUMENT

POINT I

The New York State mortgage recording tax is an excise tax imposed upon the privilege of recording a mortgage.

In the case at bar the petitioner, a private individual, as an independent contractor, entered into a Housing Contract with the United States for the construction by it, for a profit, of a housing project. The Federal government, owner of the fee, leased the property to five private corporations, in each of which the petitioner is the sole stockholder. The five private lessees entered respectively into five building-loan agreements with Chemical Corn Exchange Bank, a private bank, pursuant to which they executed five notes and mortgages which were insured by the Federal Housing Administration.

The mortgage recording taxes obviously were not upon the lands owned in fee by the United States. Equally obvious is the fact that they were not upon the Housing Contract or the leasehold interest of the five mortgagors. They were not even imposed upon the mortgages, themselves, because all of the foregoing species of taxes constitute a property tax imposed on an *ad valorem* basis. The New York State mortgage recording tax, however, is an excise tax imposed on the privilege of recording a mortgage and not on the ownership or possession of the mortgage. This was clearly established (and never since questioned or qualified) in *Franklin Society v. Bennett*, 282 N. Y. 79, 84, 86-87 (1939). It is interesting to note that the appeal in that case to this Court was dismissed "for want of a substantial Federal question" (309 U. S. 640 [1939]).

The error of the petitioner and of the dissenting memorandum in the Court of Appeals lies in their failure to recognize the private character of the petitioner and the parties to the mortgages. (See *infra*, Point III, Subsection A.)

Furthermore, assuming, *arguendo*, that the tax is a property tax, it does not follow that there is exemption. According to the Federal statute exemption is extended to certain specified taxes which do not, in any event, include the mortgage recording tax, no matter what its character. (See *infra*, Point II, Subsection [1].)

Lastly, *Federal Land Bank* v. *Crosland*, 261 U. S. 374 (1923) and *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21 (1939), relied upon by the petitioner, are based upon Federal statutes which expressly declared the Federal Land Bank and the Home Owners' Loan Corporation to be Federal instrumentalities and, therefore, exempt from State taxation.

Having erroneously concluded that the mortgage recording tax is a *property* tax *on* the mortgage, the petitioner compounds its error and adds to its confusion by asserting in Point IV of its brief herein that a mortgage is personal property and that a tax against personal property in New York is prohibited by statute (Tax Law § 3) as well as by the State Constitution. But New York Tax Law § 250 defines "real property" as including "everything a conveyance or mortgage of which can be recorded as a conveyance or mortgage of real property under the laws of the state." (See *People* v. *Gass*, 120 App. Div. 147 [1907], aff'd 190 N. Y. 565 [1908] with respect to the mortgage recording tax on the recording of a mortgage on a lease.) The New York Real Property Law § 290(1) defines "real property" as includ-

ing "chattels real, except a lease for a term not exceeding three years." The leases involved herein were each for a term of fifty-five years (Exs. pp. 155-162).

In any event, in respect to Point IV of the petitioner's brief, since construction of State statutes is involved, the State Courts' views are not reviewable by this Court. This Court has held that it is obligated to accept the State Courts' construction of the State statute, and to test its validity on that basis (*Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509, 513 [1933]).

POINT II

There is no statute which expressly exempts these mortgages from the mortgage recording tax.

(1) As to 42 U. S. C. § 1594, Savings Provisions.

In Point III of its brief, the petitioner relies for express immunity on the Housing Act of 1956 (P. L. 1020, Chap. 1029, § 511). The provision referred to, however, has nothing whatever to do with mortgages or mortgage recording taxes, nor was it the intention of Congress, by its enactment, to affect such taxes. This becomes abundantly clear upon a study of the events preceding its enactment, the Congressional report which was the basis thereof, and the dealings of the parties in the instant transaction.

Prior to the enactment of this statute it had been held that, in the absence of a Federal statute to the contrary, the leasehold interest of a lessee from the Federal government of lands owned in fee by the government was subject to a local property tax or assessment (*Offutt Housing Co.* v. *Sarpy County*, 351 U. S. 253, 260-261 [1956]). It was this specific lack of immunity to a local property tax on a

leasehold which Congress sought to correct. (See the Report of the Committee on Banking and Currency of the House of Representatives on H. R. 11742 [Appendix, pp. 4a-7a, *infra*].)

Insofar as the deal itself is concerned, although there are many provisions which reflect lack of immunity to the mortgage recording tax, only two items need be discussed. In the initiating instrument, the Invitation For Bids (Ex. A; Exs. p. 23), it is expressly stated that nothing therein "shall be deemed to relieve the eligible builder of any liability for the payment of sales or use taxes properly levied." Why, if there is total immunity to State and local taxes, was this clause necessary?

Decisive of the question are the provisions of the Housing Contract (Exs. pp. 110-143). Article XIX of the Housing Contract is entitled: "Real and personal property taxes during construction." It is provided therein (¶ [33]) that the mortgagor builders will hold the mortgagee harmless as against payment of real and personal property taxes (including taxes on a leasehold interest in real estate). The Department of Defense underwrites this agreement, expressly reserving the right to contest the legality and validity of such taxes and assessments "as it is contended that these projects are not subject to local real or personal property taxes" (Ex. B; Exs. p. 119). In the same Housing Contract, and by way of specific and express distinction from real and personal property taxes, provisions are made respecting all other taxes in paragraph 41. This paragraph is entitled: "Federal, State and Local Taxes (Except Real and Personal Property Taxes)." This paragraph deals with reimbursement for payment of Federal taxes and duties, but specifically provides that the reimbursement provision shall not apply "to social security taxes,

income taxes, excess profits taxes, capital stock taxes, transportation taxes, or any *State and local taxes.*" (Emphasis added.) Finally, to make certain that the taxes referred to are not included in the category which petitioner contends is exempt, the provision concludes with a parenthetical statement that "The treatment of State and local real and personal property taxes are covered in Article XIX, paragraph 33, of the Housing Contract" (Ex. B; Exs. pp. 136-137).

Nowhere, either in paragraph 41 or elsewhere, does it affirmatively appear that immunity attaches to any tax other than real or personal property taxes. It is submitted that Congress has not, by the Savings Provisions of 42 U. S. C. § 1594, forbidden the imposition of the mortgage recording tax in the instant transaction.

(2) As to 31 U. S. C. § 742.

In its Point I, Subsections 1 and 2, the petitioner contends that the mortgages were used by the Federal government as instrumentalities to perform governmental functions, "*i. e.*, borrow money to provide for the common defense."

From the erroneous factual premise that the government is the borrower, the petitioner impliedly places the "obligation" among those exempt from State or local taxes under 31 U. S. C. § 742. The statute refers to "stocks, bonds, treasury notes, and other obligations of the United States." The obligations of the United States, however, which are included in the statutory expression "other obligations" are those of the same categorical type as those which are specifically enumerated in the statute, to wit, "stocks, bonds, treasury notes." (See *Smith* v. *Davis*, 323 U. S. 111 [1944].)

Analysis of the details of the instant transaction, in the light of the avowed purpose of the authorizing legislation, establishes that the Government is not the borrower and that its credit or ability to borrow is not involved. A financial obligation of the United States must necessarily increase the national debt. The avowed purpose of the legislation which authorized this transaction was the utilization of a device to avoid increasing the national debt. This was the express intent of Congress, as reflected in its reports recommending the enactment of the legislation. The government is already committed to the payment of annual cash allowances for quarters for its military personnel and it is from this annual appropriation that funds will be obtained for the payment of interest on the mortgages and for amortizing the mortgages. At no time will the government be compelled to pay the entire unpaid balance due on the mortgages. (Even the right to foreclose has been stricken from the mortgages [Par. 12 of Ex. 4; Exs. p. 171].) Note, also, that the guaranty of payment (Par. 2 of Ex. E-1; Exs. pp. 149-150) provides that the government will "make each *periodic payment* becoming due." (Emphasis added.)

Lastly, it is pertinent to observe that the tax inhibited by 31 U. S. C. §742 is a "property" tax and it has been held that "A statute relieving against taxes on property will not be construed to cover excise or franchise taxes; for it is elementary that exemptions from taxation must be strictly construed" (*Vicksburg, etc., R. Co.* v. *Dennis*, 116 U. S. 665 [1886]; *Berryman* v. *Whitman College*, 222 U. S. 334 [1911]; *Mayor and City Council of Baltimore* v. *Williams*, 61 F. 2d 374 [C. C. A., 4th Cir., 1932], rev'd on other grounds 289 U. S. 36).

POINT III

Nothing in the United States Constitution requires that the mortgages be held exempt by implication from the payment of the mortgage recording tax.

The Federal Constitution does not contain an express provision exempting Federal property from State or local taxation (*Helvering* v. *Gerhardt*, 304 U. S. 405, 411 [1938]). The concept of such exemption is of judicial origin (*McCulloch* v. *Maryland*, 4 Wheat. 316 [1819]). Since the *McCulloch* decision, however, it has been established that Federal immunity from State taxation does not automatically attach to Federally-owned land. Immunity is dependent on Congressional intent. Where Congress has expressly waived immunity there can be no question of the validity of State and local taxation. The problem arises only in cases where Congress is silent. In such cases, "Silence of Congress implies immunity no more than does the silence of the Constitution" (*Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 480 [1939]; see also *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, 499-500 [1953] and *Oklahoma Tax Comm'n.* v. *Texas Co.*, 336 U. S. 342, 362, 365-366 [1949]).

A

Neither the petitioner nor the five mortgagors are instrumentalities of the United States, engaged in the conduct of an essential or usual governmental function.

Although Federal instrumentalities are unquestionably immune to State taxes, the principle has been established that immunity extends only to agencies and instrumentalities engaged in the *usual* governmental functions (*Helvering* v. *Powers*, 293 U. S. 214, 223, 225 [1934]; *United States* v.

California, 297 U. S. 175, 184-185 [1936]; see also *Flint* v. *Stone Tracy*, 220 U. S. 107, 172 [1910]; *Commissioner* v. *Modjeski*, 75 F. 2d 468 [C. C. A., 2nd Cir., 1935], cert. den. 295 U. S. 764; *Commissioner* v. *Ten Eyck*, 76 F. 2d 515, 519 [C. C. A., 2nd Cir., 1935]; *Buckstaff* v. *McKinley*, 308 U. S. 358, 362-363 [1939]). To be successful in this proceeding the petitioner must satisfy the Court that it and the five mortgagors are engaged in the exercise or pursuit of a function that is not only governmental, but one that is essentially, usually or traditionally so.

The functions of the petitioner and the five mortgagors are not essentially, usually, or traditionally governmental in character, but are commercial and proprietary. The petitioner is a private domestic corporation which was the successful bidder for the construction of a housing project. The relationship of the petitioner and the five mortgagors to the Federal government, as revealed by the terms of the transaction which ensued upon the bid and as revealed by the applicable law and regulations, has all the earmarks of that of an independent private contractor engaged in a private construction business for personal profit. The fact that the project will ultimately be government-owned does not constitute either the petitioner or the five mortgagors instrumentalities of the Federal government. In any event, they are not thereby vested with the character of an instrumentality engaged in a usual or traditional Federal function. It is so self-evident that the necessity for stating the fact borders upon the absurd, but it must be observed that it is not and never has been the function of the United States to engage in the business of constructing residential housing for its military personnel. It is the function of the government to provide such housing. In the past it has performed its obligation by making cash al-

lowances to service-men for quarters. In recent years it has embarked upon a program of providing the physical quarters in lieu of a cash allowance. However, since the government is not engaged in the construction or building business, applicable authorizing legislation by Congress has always made provision for the hiring of private industry, on an independent contract basis, for the accomplishment of the desired end. (See: 42 U. S. C. § 1594(b), [Appendix, p. 2a]; Code of Federal Regulations, Title 24, Chap. II, Sub-chapter M, §§ 292a.14, 292a.23, 292a.35, 292a.38 [Appendix, pp. 3a-4a]. See also: ¶ 6 of Ex. G-2, Exs. p. 162-a, reverse side; ¶ 14, Art. XIX of Ex. B, Exs. p. 115; ¶¶ 8, 9, 10, 11 and 12 of Ex. G-1, Exs. p. 158; trust fund clause in Ex. G-4, Exs. p. 169.) The foregoing statutory provisions, administrative regulations and contractual provisions establish that the parties to the mortgage, their relationship to each other and to the Federal government, the transaction itself, and the property which is the subject of the transaction, are all private in character, and that the petitioner is simply an independent contractor for the government, engaged in a purely private commercial enterprise for profit.

The fact that the five mortgagors will ultimately be wholly owned, through stock ownership, by the Federal government does not render the mortgagors instrumentalities of the Federal government at the present time because presently they are private corporations, the stock of which is privately owned. This is no different from the fact that in numerous instances the Federal government has acquired, by purchase or condemnation, the entire capital stock of an existing private corporation. In no case did such acquisition affect the prior character of the corporation.

Even present stock ownership by the government would not result in tax exemption (*United States* v. *Brown*, 41 F. Supp. 838, 840 [D. C.—S. D., Fla., 1941]; see also: *United States* v. *Strang*, 254 U. S. 491 [1921] and *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U. S. 549 [1921]).

B

Immunity is not impliedly extended to a mortgage recording tax by reason of the fact that the property affected by the mortgage has an exempt status.

Cases involving the Reconstruction Finance Corp., the Federal Land Bank and the Home Owners' Loan Corp. are not relevant to the discussion because as to such entities Congress has expressly provided for tax immunity. In the case at bar there is no such statute. Here, assuming *arguendo* that the property affected by the mortgages is tax exempt, there is no resultant immunity to the mortgage recording tax (*State* v. *Lantz*, 53 N. J. L. 578, 22 A. 49 [1891]. See also: *Security Savings Bank* v. *City and County of San Francisco*, 132 Cal. 599, 64 P. 898 [1901]; *Savings & Loan Society* v. *City and County of San Francisco*, 131 Cal. 356, 63 P. 665 [1901]; *City and County of San Francisco* v. *La Societe Francaise D'Epargnes et de Prevoyance Mutuelle*, 131 Cal. 612, 63 P. 1016 [1901]; *Land O'Lakes Dairy Co.* v. *Wadena County*, 229 Minn. 263, 274, 276, 277, 39 N. W. 2d 164 [1949]; *Taylor* v. *Genesee County*, 286 Mich. 674, 282 N. W. 863 [1938].)

C

Immunity from payment of property tax does not imply immunity from payment of non-property tax.

See *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, 499-500 (1953) wherein this Court approved a tax on Esso's privilege to engage in the business of storing property. That the property stored belonged to the Federal government was not deemed decisive because the Court did not consider the tax a levy "*on*" the property.

See also: *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1938) and *General Construction Co.* v. *Fisher*, 149 Or. 84, 39 P. 2d 358, 97 A. L. R. 1252 (1934.).

D

The fact that the burden of the tax may fall upon the Federal government does not create tax immunity.

It has been shown (see Point II, *supra*, pp. 10-11) that the expense of the mortgage recording tax must be borne by the petitioner and that it is not entitled to reimbursement from the Federal government. However, even if the economic burden of the tax were to be borne by the Federal government, immunity from tax is not thereby impliedly established. (*Alabama* v. *King & Boozer*, 314 U. S. 1, 8-9 [1941]; *Curry* v. *United States*, 314 U. S. 14, 18 [1941]; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149-150, 151, 153, 154-155, 156-157 [1937]; *Smith* v. *Davis*, 323 U. S. 111, 116 [1944].; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 496, 499 [1953].)

POINT IV

The trend has been to reject immunizing private parties from non-discriminatory State taxes as a matter of constitutional law.

See *United States and Borg-Warner Corp. v. City of Detroit*, 355 U. S. 466, 474-475 (1958).

CONCLUSION

We respectfully request this Court to deny the Petition for Writ of Certiorari.

Dated: Albany, New York, July 20, 1959.

Respectfully submitted,

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APPENDIX

Federal Laws:

12 U. S. Code § 1748d. Lease of property; terms and conditions.

Whenever the Secretary of the Army, Navy or Air Force determines that it is necessary to lease any land held by the United States on or near a military installation to effectuate the purposes of this sub-chapter, he may lease such land upon such terms and conditions as will, in his opinion, best serve the national interest. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force.

42 U. S. Code § 1594. Contracts for construction—Contract provisions, competitive bids.

(a) The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor

is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the Commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section. Before the Secretary shall enter into any contract as authorized by this section for construction of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41.

Definition of "eligible bidder"

(b) For the purposes of this subchapter, the term "eligible bidder" means a person, partnership, firm, or corporation determined by the Secretary after consultation with the Commissioner (1) to be qualified by experience and financial responsibility to construct housing of the type described in subsection (a) of this section, and (2) to have submitted the lowest acceptable bid.

Acquisition of capital stock of property covered by mortgage

(c) Notwithstanding any other provision of law, the Secretary of Defense or his designee is authorized

to acquire the capital stock of mortgagors holding property covered by a mortgage insured under sections 1748-1748g and 1748h-1 of Title 12, and to exercise the rights as holder of such capital stock during the life of such mortgage and, upon the termination of the mortgage, to dissolve the corporation; to guarantee the payment of notes or other legal instruments required by the Commissioner of such mortgagors; to make payments thereon; and to guarantee and indemnify the Armed Services Housing Mortgage Insurance Fund against loss in cases where so required. All housing facilities placed under the control of the Secretary of Defense pursuant to the provisions of this subchapter shall be deemed to be housing facilities under the jurisdiction of the military department to which they are assigned.

31 U. S. Code § 742.

"Except as otherwise provided by law, all stocks, bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority."

Code of Federal Regulations, Title 24, Chap. II, Subchapter M.

"§ 292a.14 *Covenant against liens.* The mortgage shall, except as otherwise provided in this subpart, contain a covenant against the creation by the mortgagor of liens against the property superior or inferior to the lien of the mortgage."

"§ 292a.23 *Private corporation or association eligible.* A private corporation or association (referred to in this subchapter as 'mortgagor,' 'Corporation,'

or 'mortgagor corporation') is eligible for mortgage insurance if formed or created, with the approval of the Commissioner for the purpose of providing housing for rent or sale, and possessing powers necessary therefor and incidental thereto. So long as such contract of insurance is in effect, the corporation or association shall engage in no business other than the construction and operation of a housing project limited to nontransient occupancy."

"§ 292a.24 *Stock acquisition by Military.* Upon completion of the project the Military shall acquire all the stock of the mortgagor corporation and shall hold the same and manage and operate the project property so long as there is outstanding thereon a mortgage insured by the Commissioner."

"§ 292a.35. *Eligibility of property.* (a) A mortgage to be eligible for insurance must be on the interest of the lessee for not less than fifty-five years on a lease executed by the Military or such other interest in real estate as may be approved by the Commissioner.

(b) The property constituting security for the mortgage must be held by an eligible mortgagor as herein defined and must at the time the mortgage is insured be free and clear of all liens other than that of such mortgage except as otherwise provided in this subpart."

"§ 292a.38 *Eligibility of title.* In order for the mortgage property to be eligible for insurance, the Commissioner must determine that marketable title thereto is vested in the mortgagor as of the date the mortgage is filed for record. The title evidence will be examined by the Commissioner and the original endorsement of the credit instrument for insurance will be evidence of its acceptability."

Congressional Report of Committee on Banking and Currency (H. R. 11742 [84th Congress, 2nd Sess., House Report No. 2363]) (Excerpt on pp. 48-49)

"The bill would clarify congressional intent with respect to the rights of local communities to tax the interests of mortgagors under the Wherry Act mortgage insurance program (title VIII of the National Housing Act prior to the Housing Amendments of 1955) who have leased the mortgaged property from the United States. * * *

Section 603 of the bill would expressly provide that nothing contained in title VIII or other law shall be construed to exempt from State or local taxes or assessments any right, title, or other interest of a lessee from the Federal Government with respect to any property covered by a mortgage insured under that title. However, the section would provide that any taxes or assessments must be reduced (from the amount otherwise levied or charged) by such amount as the Federal Housing Commissioner determines to be equal to (1) any payments in lieu of taxes made by the Federal Government to the local taxing bodies with respect to the property plus (2) any expenditures made by the Federal Government for streets, utilities, and other services for or with respect to the property. * * *

It would thus be made clear that States and communities, under adequate State tax statutes, would be able to obtain from Wherry Act projects taxes and assessments which, with payments and expenditures by the Federal Government for services in connection with the projects, would equal the taxes and assessments collected by the local taxing officials from other similar property.

The need for clarification of this matter has existed since the initiation of the Wherry Act program because of the doubtful validity and effectiveness of various tax statutes of the States as applied to the interests of the mortgagor corporations where the projects are located on lands owned by the United States. *The problem has involved the major constitutional question of the right of States to tax the mortgagor's leasehold interest,* and has been complicated by the large variety of statutes in the individual States which local taxing officials have attempted to apply to the mortgagor's interests. There has been a substantial amount of litigation on this matter in State and lower Federal courts over the period of the program without uniformly resolving the questions involved. The recent decision of the Supreme Court of the United States in the case of *Offutt Housing Company* v. *County of Sarpy*, 351 U. S. 253 (1956), upheld the right of local taxing officials in the State of Nebraska to levy certain State and county 'personal property' taxes against the lessees' interest in a title VIII project, measured by the full value of the buildings and improvements. However, as a large portion of the projects have not been subject to State and local taxes, payments in lieu of taxes have frequently been made to local taxing officials in exchange for usual services, such as schools furnished to the projects. Also, many expenditures have been made by the Federal Government for streets, utilities, schools, and other services normally furnished by taxing bodies. As tax payments for a project normally have an ultimate effect on the rentals paid

by military and civilian personnel at the military installations it is important that no payments be made to communities which would constitute a windfall over and above normal taxes. Consequently, it is very important to assure that the project does not duplicate payments for services furnished to it. This duplication would be avoided under the provision in the bill for deductions from tax payments, as explained above." (Emphasis added.)

New York Real Property Law § 290 (1):

"The term 'real property,' as used in this article, includes lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years."

New York Tax Law:

"§ 4. Exemption from taxation.

The following property shall be exempt from taxation.

1. Property of the United States except property subject to taxation under the constitution and laws of the United States."

"§ 250. Definitions.

The term 'real property' as used in this article [Art. 11], in addition to the definition thereof contained in section two of this chapter, includes everything a conveyance or mortgage of which can be recorded as a conveyance or mortgage of real property under the laws of the state. The term 'mortgage' as used in this article includes every mortgage or deed of trust which imposes a lien on or affects the title to real property, * * *."

"§ 253. Recording tax.

A tax of fifty cents for each one hundred dollars and each remaining major fraction thereof of principal debt or obligation which is, or under any contingency may be secured at the date of the execution thereof or at any time thereafter by a mortgage on real property situated within the state recorded on or after the first day of July, nineteen hundred and six, is hereby imposed on each such mortgage, and shall be collected and paid as provided in this article. If the principal debt or obligation which is or by any contingency may be secured by such mortgage recorded on or after the first day of July, nineteen hundred and seven, is less than one hundred dollars, a tax of fifty cents is hereby imposed on such mortgage, and shall be collected and paid as provided in this article."

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 162

S. S. SILBERBLATT, INC., PETITIONER

v.

THE TAX COMMISSION OF THE STATE OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's order of October 12, 1959, inviting the Solicitor General to set forth the views of the Federal Government as to the importance of the issues involved. We believe, for the reasons stated below, that the case presents substantial issues as to the nature and status, for local taxing purposes, of so-called Capehart Act mortgage corporations.

1. On August 11, 1955, Congress enacted the Capehart Act, 42 U.S.C. (1952 ed., Supp. V) 1594, an amendment to the National Housing legislation to authorize an extensive program of military housing of substantial importance to the defense requirements

of the nation.[1] Briefly, the Capehart Act provides a means of financing the construction of vitally needed housing facilities for military and civilian personnel through the medium of government guaranteed loans.[2] Under it, corporations, privately organized, are created for the sole purpose of leasing Government land and mortgaging the leasehold at an amount sufficient to finance the construction of military housing projects. These corporations, after acquisition of the leasehold, possess no assets of any value other than the proceeds of the mortgage which are to be paid over to the contractor; no methods are provided whereby profits may be realized by these corporations (rentals being payable directly to the United States); all their capital stock is endorsed in blank and deposited in escrow for delivery to the military department concerned; title to the improvements vests in the United States upon completion of construction; the leasehold estate has no earning capacity, the only value in the mortgage lying in the fact that it is insured by the Federal Housing Administration and its payment is undertaken by the military department concerned. Re-

[1] The Office of the Assistant Secretary of Defense has informed us that as of September 18, 1959, a total of 290 Capehart Act projects, totaling 109,212 housing units, had been approved by the Assistant Secretary of Defense.

[2] An appreciation of the purpose and significance of the Capehart Act military housing program is provided by the Senate Committee on Banking and Currency in S. Rep. No. 231, 85th Cong., 1st Sess. That report contains a complete review of military housing programs from the inception of the so-called Wherry Act (Title VIII of the National Housing Act, in effect prior to the enactment of the Housing Amendments of 1955) through the enactment of the Housing Act of 1956, c. 1029, 70 Stat. 1091.

demption of the mortgages is accomplished by the United States primarily through the use of current rentals and quarters allowances payable to military personnel. From their very inception the sole purpose of such corporations is to afford the military department concerned the opportunity of utilizing the provisions of the Capehart Act to finance the construction of military housing projects.

Corporations formed at the direction of the armed services, pursuant to the Capehart Act, serve no function of any substance except to enable the armed services of the United States to construct, acquire and pay for housing projects required for military personnel without utilizing current appropriations or Treasury loans. For these reasons, such corporations may properly be regarded as direct instrumentalities of the United States in performing its governmental function of providing military housing and, as such, partake of the immunity of the United States from state taxation to the same extent as other constituent parts of the Federal Government. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Clallam County* v. *United States*, 263 U.S. 341; *N.Y. ex rel. Rogers* v. *Graves*, 299 U.S. 401; cf. *Indian Motorcycle Co.* v. *United States*, 283 U.S. 570. See also *Green* v. *Eglin AFI Housing, Inc.*, 104 So. 2d 463 (D.C. App., Fla.).

2. The Court of Appeals held that the New York mortgage recording tax[3] (Section 253 of the New

[3] Although the tax here will be borne by petitioner, and not the Federal Government, it is reasonable to assume that the decision below, if followed, would result in private builders increasing their bids in the future, and to that extent of increasing the ultimate costs to the Government.

York Tax Law, 59 McKinney's Consolidated Laws of New York) is not a tax on property, but a tax upon the privilege of recording a mortgage. This Court has held in cases involving similar tax statutes that, for Federal purposes, the tax is to be considered a tax upon the mortgage where it falls upon a corporation which is an agent or instrumentality of the United States. *Federal Land Bank* v. *Crosland*, 261 U.S. 374; *Pittman* v. *Home Owners' Corp.*, 308 U.S. 21. The rationale of these decisions would appear to be equally applicable here, since the corporations—although privately organized—are instrumentalities of the Federal Government.[1]

Respectfully submitted.

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NOVEMBER 1959.

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[1] For similar reasons this case may also present an issue under Section 3701 of the Revised Statutes (31 U.S.C. (1952 ed.) 742) which exempts obligations of the United States from state or local taxation.

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